

United States v. Simmons, 02-15891

AUG 04 2003

KLEINFELD, Circuit Judge, dissenting:

CATHY A. CATTERSON
U.S. COURT OF APPEALS

I respectfully dissent.

Like the majority, I reject Simmons's argument that he has standing as an individual to challenge the forfeiture of trust assets. His tactical decision to act in the district court only in his trustee capacity means he may not now appeal the judgment as an individual as he was not, individually, a party below.

Nevertheless, the trustee, as such, has standing (and a duty) to litigate on behalf of the beneficiaries. Though Simmons's purpose was to defraud the government of taxes owed, nevertheless he used unchallenged trust language to create a trust for designated beneficiaries (his children and grandchildren apparently), and deposited a res. It's their money now. "Where the purpose of the settlor in creating the trust is to defraud creditors or other persons, but the trust is created for the benefit of a third person and not for the benefit of the settlor himself, if the beneficiary at the time of the creation of the trust had no notice of the fraudulent purpose of the settlor, he can enforce the trust, provided that the

trust is not illegal for any other reason.”¹ The beneficiaries here have an interest in the money remaining in trust beyond Simmons’s obligation to the government and Simmons, as trustee, has a duty to represent their interest.

Suppose, hypothetically that a trustor put \$500,000 in trust for his children to evade \$100,000 in taxes, which with penalties and interest became a \$300,000 obligation to the government. The trustee would have standing and a duty to litigate to protect the children’s \$200,000. The effect of the fraudulent purpose is to enable the government to get \$300,000 off the top, and (under paragraph 24 of Simmons’s trust and under the law of trusts²) to subject the trustee to judicial removal, replacement and restitution. A guardian ad litem for the beneficiaries may be appropriate, if they are minors.

¹ Restatement 2d of Trusts § 63(2), comment f.

² See, e.g., California Probate Code §§ 15642, 15660, 16004.